IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.M.JOSEPH

THURSDAY, THE 9TH AUGUST 2007 / 18TH SRAVANA 1929

WP(C).No. 23107 of 2007(A)

PETITIONER:

ST.SEBASTIAN HIGH SCHOOL, CHITTATTUKARA, ELAVALLY PANCHAYATH, THRISSUR, REP. BY ITS MANAGER, FR.PAULSON PALATHINGAL, AGED 44 YEARS, S/O.ANTONY, CHITTATTUKARA.

BY ADV. SRI.RAJIT
SRI.RANJIT BABU

RESPONDENTS:
----

1. **STATE OF KERALA, REP. BY THE SECRETARY, LOCAL SELF GOVERNMENT, SECRETARIAT, THIRUVANANTHAPURAM.**

2. **ELAVALLY GRAMA PANCHAYATH, ELAVALLY, THRISSUR, REP. BY SECRETARY.**

3. **SECRETARY, ELAVALLY GRAMA PANCHAYATH, ELAVALLY, THRISSUR.**

4. **DISTRICT EDUCATIONAL OFFICER, DISTRICT EDUCATIONAL OFFICE, CHAVAKKAD, THRISSUR.**

BY ADV. SRI.P.SANTHOSH (PODUVAL)
BY ADV. SRI.C.P.SUDHAKARAPRASAD ADV.GENERAL

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 09/08/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

W.P.(C) NO.23107/2007

APPENDIX

PETITIONER'S EXHIBITS

EXT.P1:- COPY OF THE LETTER NO.A3/01/06 DT.29.8.06. ISSUED BY THE 3RD RESPONDENT.

EXT.P2:- COPY OF THE ORDER NO.B1-9461/06/L.DIS DT. 15.1.07.

EXT.P3:- COPY OF THE PHOTOGRAPHS OF THE BUILDING CONSTRUCTED BY THE PETITIONER.

EXT.P4:- COPY OF THE NOTICE NIO.A3.236/07 DT.16.7.07 ISSUED BY THE 3RD RESPONDENT TO THE PETITIONER.

EXT.P5:- COPY OF THE CIRCULAR NO.24136/R.A. 1/07 DT. 20.6.07.

EXT.P6:- COPY OF THE REPRESENTATION DT. 21.7.07 ISSUED BY THE PETITIONER TO 3RD RESPONDENT.

/TRUE COPY/

P.A. TO JUDGE

tss

K.M.JOSEPH, J.

\- -

W.P.(C).No.23107 OF 2007

\- -

Dated this the 9th day of August, 2007

JUDGMENT

Petitioner has approached this court seeking to quash Ext.P4 notice issued by the third respondent. Petitioner seeks a mandamus to the second and third respondent not to create obstacles in the construction work of the building carried out by the petitioner.

The case of the petitioner in brief is as follows:

Petitioner's school comes under the Thrissur Arch Diocese Corporate Educational Agency. Petitioner's school is established in the year 1904 and it is one of the oldest school in the State of Kerala. Petitioner decided to construct a three storied building in the property belonging to the school to cater the need of the students as well as the requirements of the corporate agency. Before undertaking the construction, petitioner submitted an application seeking permission for the construction of a three storied building. Ext.P1 no objection certificate was issued on

29/08/2006 certifying that no permission is required for construction of a non-residential building in the property of the petitioner. Pursuant to Ext.P1, petitioner submitted an application and got Ext.P2 permission from the District Educational Officer on 15/01/2007 to construct the building as per the specification in the K.E.R. Pursuant to Ext.P1 and P2 petitioner has entrusted the work of the building to a contractor who commenced the construction work in January 2007 and completed the entire structure of the ground floor upto the roof and what remains is the concreting of the roof. Ext.P3 is the photographs of the building constructed. It is stated that the second respondent is presently been administered by the CPI (M) and as a result of the on going dispute between the Government and the corporate agencies with regard to the admission to professional courses, the second respondent has been trying to see that the construction work of the petitioner's school is brought to a stand still. Petitioner has been rendering yeoman service to the students community in particular and local people at large. Ext.P4 is the stop memo requiring the petitioner to stop all construction activities on the ground that as per Circular No.

24136/R.A 1/07 dated 20-06-2007 building rules have come into force in the Grama Panchayat and the construction is without obtaining permit from the Panchayat. Ext.P5 is the circular dated 20/06/2007. According to the petitioner the circular is not applicable in this case. As the construction of the building is to be completed urgently, considerable raw materials such as cement and sand are stored in open, it is stated. 250 bags of cement along with sand and metal are presently being stored in the site for the construction of the building and heavy loss is caused because of the construction being stopped, it is stated. Petitioner submitted Ext.P6 representation.

2. Counter affidavit is filed by the respondent-Panchayat contending that pursuant to Ext.P4 circular, notices were circulated and published in the Panchayat intimating the public about the fact. Ext.R2(a) is the notice dated 18-06-2007. Pursuant to that, petitioner submitted Ext.R2(a). Inspection conducted on 02/07/2007 revealed that pits and trenches were dug so as to provide basement to the pillars to be constructed and materials were found in the premises. It is stated that it was instructed to the petitioner that only after obtaining the permit

any further construction could be effected to which the petitioner had agreed. Petitioner submitted application in the prescribed form for permit as Ext.R2(C). On 16/07/2007 it was found that construction is going on. On 16/07/2007 Ext.P4 was issued. As petitioner was not in station on 16/07/2007 it could not be served on the same day and it was sent by registered post. There is reference to Ext.R2(e) letter sent to the sub Inspector. Respondents have also produced photographs as Ext.R2(f) and stated that petitioner has not approached this court with clean hands.

3. Petitioner has filed reply affidavit. Therein it is interalia stated that by Ext.R2(a) all those who have started construction but completed are required to furnish the details of the building by 30/06/2007. So petitioner submitted Ext.R2(b) on 29/06/2007 in which he has stated that the construction has reached the first floor and that is not an application for permit. It is stated that due to heavy rain all the construction work was stopped by the 1st week of July and due to heavy rain the District Collector had already declared 4th, 5th, 6th and 18th as holidays for all the schools in Thrissur district and there was no question of

continuing the construction work during July 2007. It is stated that the statement in the 4th paragraph of the writ petition that construction was started in January 2007 related to preliminary work of clearing the area, digging the basement portion etc. It is stated that laying foundation stone of the school building was performed by the Arch Bishop of Thrissur District on 16/03/2007. Actual construction in full swing was started from 16/03/2007, it is stated.

4. I heard counsel for the petitioner and the learned Advocate General and the counsel for the Panchayat also.

5. Learned counsel for the petitioner submits that the building rules were brought into force in respect of Panchayaths on 06/06/2007, but Ext.P5 circular was published only on 20/06/2007. In Ext.P5 circular there was a requirement that the fact of the building rules being brought into force should be published in the notice board. Ext.R2(a) is dated 18/06/2007 i.e. even prior to the publication of the circular on 20/06/2007, he points out. Petitioner would reiterate his case and submit that petitioner obtained no objection certificate in the year 2006 and the permission from the DEO in January 2007 and the

construction was started in full swing after the inauguration on 16/03/2007 by the Arch Bishop. Learned counsel for the petitioner submits that clause 5 of Ext.P5 circular will prohibit construction without permit only in respect of cases where construction has not progressed beyond the ground level. He would invite my attention to the materials produced to contend that there can be no doubt that the construction has certainly reached the ground level and infact as stated in Ext.R2(b) dated 29/06/2007 it had reached upto the level of the first floor. This is reiterated in Ext.R2(c) also, he contends. Ext.R2(c) was given only for regularisation and as asked for by the respondent he submitted. It is virtually inconceivable to think that construction would not have reached the stage above the ground level as on 20/06/2007 when the circular was issued having regard to the fact that construction is for a three storied building, he contends. Counsel for the petitioner submits that this is a case of harassment to the institution by the powers that be and even though it is a question of fact, the materials on record would leave no one in doubt that the construction made by the petitioner had reached above the ground level as on 20/06/2006

which is the date of Ext.P5 circular.

6. Learned Advocate General would submit that what is involved in this case is essentially a factual dispute namely as to whether the construction has reached upto the stage or not as contemplated in Clause 5 of Clause II in Ext.P5 and this court may not be invited to decide this issue. He would submit that Ext.P4 has been issued under Rule 19 of the Kerala Municipal Building Rules and he would further submit that petitioner has a right of appeal before the Tribunal for local self Government under Rule 160 of the Kerala Municipality Building Rules under Clause 6 thereof. He would submit that the Tribunal would be better equipped with to deal with the factual dispute raised and enter finding. He invited my attention to the pleadings to show that the case of the petitioner is that clause 5 of Clause II in Ext.P5 circular is not applicable to the petitioner and it is therefore purely a factual question.

7. Learned counsel for the Panchayat would also reiterate his contentions. He would further submit that the conduct of the party does not entitle him to the discretionary jurisdiction under Article 226 of the Constitution. He would point out that the

construction is stated in the writ petition to have been started in January 2007, but in Ext.R2(b) it is stated to have been started on 16/03/2007. He would also submit that petitioner had in fact submitted Exts.R2(b) and (c) which are not referred to in the writ petition. It is explained by the counsel for the petitioner that Ext.R2(C) was the application for regularisation.

8. It is to be noted that there is a circular issued as Ext.P5 by the Government. The petitioner has not challenged the circular as such. Ext.P4 notice was based on the circular citing clause 5 thereof. Therefore, I am not called upon to decide the validity of the circular. The Panchayat also supports the action under the terms of the circular which is not under challenge. The question therefore boils down as to whether clause 5 in Ext.P5 circular is attracted or not. I would think that, that is essentially a factual dispute. I would think that it may not be appropriate for me to consider this issue in the totality of facts of this case and I would think that petitioner is to be relegated to the pursuit of the alternate remedy provided under Rule 160 of the Kerala Municipality Building Rules as contended by the learned Advocate General.

In such circumstances petitioner is to be relegated to the pursuit of appeal which ofcourse petitioner has to do within the period of limitation. Accordingly, the writ petition is disposed of relegating the petitioner to the pursuit of the remedy provided under Rule 160 of the Kerala Municipality Building Rules. As I am relegating the petitioner to pursue the alternate remedy, it is open to the petitioner to seek interim relief therein and if any application for interim relief is filed, the Tribunal will consider the application and take a decision thereon without any delay.

(K.M.JOSEPH, JUDGE)

sv.